Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1021

FLAV-O-RICH, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The following abbreviations are used in this petition:

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Petitioner's Original Appendix in Court of Appeals ..... P.O.A.
Petitioner's Original Supplemental Appendix in Court of Appeals ..... P.O.S.A.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

FLAV-O-RICH, INC., *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Flav-O-Rich, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on October 26, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit was filed on October 26, 1976 (Case No. 76-1786) but is not yet reported. The opinion of the National Labor Relations Board (NLRB or Board) was entered on June 11, 1976, in Board Case No. 9-CA-8146 and is reported at 224 NLRB No. 88 (1976). The opinions are reproduced as Appendices* A and B, respectively.

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* All citations herein to "a" refer to the Appendix, *infra*, to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on October 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the NLRB can require a successor employer, which had refused to bargain based on a good-faith dispute as to its "successorship" status but had been innocent of any independent unfair labor practices, to bargain with a union where the employees simultaneously and overwhelmingly reject the union when they receive notice from that union of a Board order to their employer to bargain.

2. Whether in view of the overwhelming rejection of a union brought about by the Board's own order to bargain, the NLRB acted improperly in ignoring the employees' rejection of the union by refusing to conduct an election, modify its bargaining order, or even to consider evidence of the employees' wishes.

STATEMENT OF THE CASE

Petitioner Flav-O-Rich, Inc., is a Kentucky corporation engaged in the business of processing and distributing milk and milk products. (P.O.A. 12) During the fall of 1973 the Petitioner began negotiations with the Leatherwood Company of Bluefield, West Virginia, for the purchase of certain assets used by Leatherwood in the processing and distribution of milk and milk products. (P.O.A. 173) Flav-O-Rich intended to purchase, and in fact only did purchase, certain assets from Leatherwood and did not assume any contractual

or other liabilities of the Leatherwood Company. (P.O.A. 60-103, 110).

The Leatherwood Company employed approximately 50 persons in its milk and milk products processing and distribution operations, which employees were represented by the Teamsters Local 175. (P.O.A. 165) On October 25, 1973, after it had become apparent to the Petitioner that the asset purchase would be consummated, the Petitioner met with the Leatherwood employees (who had been notified of the impending sale by Leatherwood) to offer employment applications and details concerning the milk and milk product processing and distribution operations which the Petitioner intended to establish and operate in the area after the acquisition of the assets. (P.O.A. 19, 118, 172-74, 184-85) At this meeting it was explained to the Leatherwood employees that the Petitioner did not consider itself a "successor" employer and that it was not assuming the contractual bargaining relationship which had existed between the union and Leatherwood.[1] The Petitioner received no complaints or demands for bargaining or other remarks which might be construed as support of the union at this meeting. (P.O.A. 19, 175)

By letter of October 29, 1973, Petitioner notified the union that it did not consider itself a "successor" and that it doubted the union's majority support among the employees and suggested that the union seek to have a Board-conducted representation election to ascertain whether the employees hired by Petitioner indeed des-

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[1] Leatherwood had an existing labor agreement with the union which had been entered into in 1971 and which was due to expire on November 30, 1973. (P.O.A. 13)

ired to be represented by the union. (P.O.A. 108) For these reasons the Petitioner in good faith refused to bargain with the union.[2]

This action by the Petitioner resulted in the union's filing of a charge with the National Labor Relations Board alleging a refusal to bargain in violation of Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5).[3] (P.O.A. 30) A hearing was held before an Administrative Law Judge, and on April 24, 1974, Judge Thomas Ricci issued a decision holding that Petitioner had a duty to bargain as a "successor" employer and that Petitioner had failed to present sufficient affirmative evidence to rebut the presumption of majority support for the union.[4] (12a-26a)

Petitioner filed Exceptions to the Administrative Law Judge's Decision with the Board, including an exception to the Judge's finding that the union repre-

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[2] Despite the Petitioner's belief that the union did not enjoy majority support among the employees, established Board law prevented the Petitioner from filing its own petition with the Board for an election or conducting a poll of the employees. *See, e.g.*, United States Gypsum Co., 161 NLRB No. 61 (1966). *Cf.* Taft Broadcasting, 201 NLRB No. 113 (1973); Lloyd McKee Motors, Inc., 170 NLRB No. 140 (1968). Thus, while the Petitioner's principal contention related to its good-faith legal dispute as to its "successorship" status, it was precluded from resolving the issue of majority support for the union through an NLRB-conducted representation election or poll in November of 1973.

[3] The charge and resulting complaint became Board Case No. 9-CA-8146. (P.O.A. 30-40)

[4] However, at the hearing the Judge prevented Petitioner from eliciting evidence from the union steward concerning employee support of the union. (P.O.A. 186-87). The question of majority support was then only dealt with in a footnote in the decision. (20a)

sented a majority of the employees. (P.O.A. 26-29) On August 19, 1974, the Board issued its Decision and Order finding that Petitioner was a "successor" and, by adopting findings of the Administrative Law Judge, that there was not sufficient affirmative evidence to prove lack of majority.[5] (10a) The Board, therefore, ordered the Petitioner to bargain with the union. No independent unfair labor practices, particularly with regard to violations of Sections 8(a)(1), (2) or (3) of the National Labor Relations Act, 29 U.S.C. §§ 158 (a)(1)-(3), were shown.[6]

By an August 21, 1974 letter the union mailed copies of the Board's "Notice" (ordering the Petitioner to bargain) to Petitioner's employees. (P.O.S.A. 78-80) As a result of this mailing employees of the Petitioner spontaneously approached management questioning the continued representative status of the union in a fashion which led Petitioner's supervisory and management personnel to believe that a majority of the employees did not support the union. (P.O.A. 3-7) (P.O. S.A. 84)

Because the employee remarks established a strong doubt as to the support of the union, Petitioner proceeded in a timely fashion to determine whether the union in fact represented a majority.[7] (P.O.A. 3-7)

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[5] No evidence whatsoever was presented by the union that it still retained majority support, however. (P.O.A. 119-97)

[6] Nor have any independent unfair labor practices, schemes to undermine majority, etc., ever been proven throughout these proceedings.

[7] The Petitioner's decison to make such determination conformed to the body of law which requires an employer to be in possession of affirmative facts indicating a lack of majority support. *See, e.g.*, United States Gypsum Co 161 NLRB No. 61 (1966).

(P.O.S.A. 80-85) Thus on September 16, 1974, Flav-O-Rich conducted a noncoercive secret ballot poll of its employees in strict compliance with the standards established by the Board for such polls in the case of *Struksnes Construction Company,* 165 NLRB No. 102 (1967). (P.O.S.A. 80-85) The poll results reflected an overwhelming repudiation of the union's presumed support among a majority of Petitioner's employees:

Results of Poll

NO, WE DO NOT WANT THE UNION	25
Yes, We Want The Union	7
Absent On Day Of Poll	5
Did Not Vote	3
Total Eligible Employees	40

Moreover, there has never been any assertion whatsoever that the poll was anything but fairly and properly conducted.

Based upon the employee comments in response to the union mailing and the unequivocal mandate of the poll, the Petitioner filed a Motion to Abate Proceedings and Reopen Record with the Board while simultaneously filing an employer petition for a representation election (Board Case No. 9-RM-726). Petitioner's Motion requested that the Board abate proceedings, reopen the record and receive evidence of the lack of union majority support or, in the alternative, for the Board to conduct an election pursuant to Petitioner's "RM" (election) Petition. (P.O.A. 3-7)

On October 31, 1974, the Board summarily denied the Motion to Abate Proceedings and Reopen the

Record.[8] (27a) The Order, however, failed to set forth any findings, reasoning, or grounds for the Board's denial of Petitioner's Motion. Petitioner filed a Petition for Review with the Court of Appeals for the Sixth Circuit, requesting that enforcement of the Board's orders of August 19, 1974 (to bargain) and October 31, 1974 (denying Motion to Abate) be denied. The Court of Appeals in a terse decision held that the Board was guilty of "an impermissible delegation of authority" and that because "the Board has not disclosed the reasoning behind [its] denial of Petitioner's Motion to Reopen we cannot enforce the closely related bargaining order" and, therefore, remanded the case to the Board for corrective action with instructions. (28a-36a)

The Board "accepted" the remand, and on June 11, 1976, it issued a "Supplemental Decision and Order"[9] denying Flav-O-Rich's Motion to Abate Proceedings and Reopen Record and ordering Petitioner to bargain with the union notwithstanding the clear lack of majority support for the union which it still refused to acknowledge. (3a-9a)

On June 16, 1976, Flav-O-Rich filed a Petition for Review with the Court of Appeals for the Sixth Circuit, and that court, by order dated October 26, 1976, summarily affirmed the Board's Supplemental Decision and Order without briefs or oral arguments (over the objections of the Petitioner).[10] (2a) Petitioner seeks review of this summary affirmance.

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[8] Both the Board's "Decision and Order" of August 19, 1974, and "Order" of October 31, 1974, are reported as Flav-O-Rich, Inc., 212 NLRB No. 144 (1974). These orders are set forth in Appendices C and D, respectively, to this Petition.

[9] Reported at 224 NLRB No. 88 (1976). This order of the Board is set forth in Appendix B to this Petition.

[10] The order of the Court of Appeals is set forth in Appendix A to this Petition.

REASONS FOR GRANTING THE WRIT

Flav-O-Rich's position, though of profound and widespread significance in the administration and enforcement of labor relations law, may be narrowly stated: Where the National Labor Relations Board has ordered an employer to bargain with a union based solely on the employer's successorship status and the bargaining order disseminated by the union is the impetus for the employees' overwhelming rejection of of the union, the Board should be required to consider evidence of the union's loss of majority support, notwithstanding the fact that such loss might have occurred after issuance of the bargaining order, particularly where the employer has engaged in no other unfair labor practices.

At the outset it is important to stress that we are not contesting the Board's authority or power to issue bargaining orders pursuant to Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c); nor is the decision of the Board and Court of Appeals relating to Petitioner's successorship status joined as an issue here. What is in sharp focus is the issue of the continuing propriety of a bargaining order where the cumulative actions of the Board and the union, *not the employer,* have precipitated a rejection of the union by a majority of the employees it purports to represent.

There can be no doubt of the importance of this issue. At stake are not only the rights of an employer who had not engaged in unfair labor practices, other than a refusal to bargain due primarily to a bona fide legal dispute as to its successorship status, but also the employees' right to free choice. The failure of the Board and Court of Appeals to consider the novel facts of this case and their far-reaching implications is based on a

misplaced reliance on this Court's holding in *Franks Brothers Company* v. *N.L.R.B.,* 321 U.S. 702 (1944). This reliance has resulted in summary treatment and disposition of significant legal issues that deserved careful consideration under an application of principles enunciated by this Court in *N.L.R.B.* v. *Gissel Packing Company,* 395 U.S. 575 (1969).

The rigid adherence to principles whose application is wholly inappropriate in the unique circumstances found here is contrary to well-settled law relating to the enforcement of remedies chosen by the Board when there have been changes in the circumstances which initially occasioned election of a specific remedy. It is axiomatic, of course, that the remedy chosen by the Board must be primarily *remedial* as opposed to punitive in nature. *Republic Steel Corporation* v. *N.L.R.B.,* 311 U.S. 7 (1940). Moreover, this Court has held that:

> When circumstances do arise after the Board's Order has been issued which may affect the propriety of enforcement of the Order, the reviewing Court has discretion to decide the matter itself or to remand it to the Board for further consideration. [*N.L.R.B.* v. *Jones & Laughlin Steel Corporation,* 331 U.S. 416, 428 (1947)]

The Board's bargaining order to Petitioner was occasioned by a good-faith dispute as to the successorship status of Petitioner. However, immediately after the Board had issued its decision, circumstances respecting the presumed majority support enjoyed by the union changed dramatically. Again, the stimulus for this radical change was not any action of the employer but rather acts of the Board and union.

The Petitioner recognizes that there are circumstances where a bargaining order remains appropriate

even where a lack of majority exists. The Board and Court of Appeals rely on just such a case as the basis of their decisions here, that is, the case of *Franks Brothers Company* v. *N.L.R.B., surpa.* However, in relying upon the language in *Franks,* the Board and Court of Appeals fail to take into account the peculiar and clearly distinguishable circumstances present in this case which require that *Franks* be distinguished from the Petitioner's particular situation and which require a different outcome than exists now.

Franks involved a long-standing employer/employee relationship, considerable acrimony between the employer and the union, numerous "outrageous" and "pervasive" unfair labor practices which were charged and proven, and the discharge and replacement of a number of union-member employees which reduced the existing majority support for the union to a minority. There is simply and absolutely no point of comparison between the *Franks* case and the matter here presented. The two cases only provide points of contrast.

Petitioner Flav-O-Rich is not a long-standing employer of the employees involved here. Because it merely purchased certain assets of the previous employer (Leatherwood Company) and did not assume contractual duties to bargain with the union or other liabilities of the selling company, Petitioner in good faith did not consider itself to be a "successor" employer. The Board, however, rejected Flav-O-Rich's contentions regarding its nonsuccessorship status and ordered it to bargain. The Board further held that sufficient objective evidence had not been presented to substantiate Flav-O-Rich's asserted doubt as to the majority employee support enjoyed by the union. (6a)

Because of the peculiar factual setting of this case, coupled with the severely limited ability of an employer to demonstrate lack of majority support, Petitioner was compelled to be a passive witness to its own entanglement in a form of "Catch-22." Petitioner was in the untenable position of entertaining bona fide doubts as to whether the union enjoyed majority support prior to the Board's initial decision but was bound not to act contrary to established Board law, which requires an affirmative demonstration of lack of support before an employer can proceed to confirm whether the union represents a majority of the employees.[11]

It was not until after the union's distribution of copies of the Board's "Notice" (ordering Petitioner to bargain) to certain of Petitioner's employees that Pe-

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[11] Yet at the same time the union offered no evidence to substantiate that it enjoyed majority support. While it can be argued that the union is under no obligation to do this because the presumption has not been rebutted, the difficulty of the employer's prevailing in this area has been pointedly articulated by one Board member (Kennedy) in his dissent in Automated Business Systems, 205 NLRB No. 152, 84 LRRM 1042, 1050 n.29 (1973) (quoting the board in Stoner Rubber Company, 123 NLRB No. 152 (1959)):

> *Proof of majority is peculiarly within the special competence of the Union.* It may be proved by signed authorization cards, dues check-off cards, membership lists, or any other evidentiary means. *An Employer can hardly prove that a Union no longer represents a majority since he does not have access to the Union's membership lists and direct interrogation of employees would probably be unlawful as well as of dubious validity.* [Emphasis supplied]

The *Automated Business Systems* case was reviewed by the Court of Appeals for the Sixth Circuit, which also recognized the pertinence of the *Stoner* rationale in its decision. Member Kennedy's dissent was cited with approval in the Court's decision (which refused to enforce the Board's Order). Automated Business Systems v. N.L.R.B., 497 F.2d 262, 270 (6th Cir. 1974).

titioner came into possession of sufficient affirmative facts which gave rise to a "good faith doubt" of the union's majority support and thus, within existing Board law, justified the Petitioner's polling of employees to ascertain with certitude the sentiments of employees regarding the union. Therefore, it was union action, and not any action or stimulus by the Petitioner, which induced employees to approach Petitioner's management to question the representative status of the union.

Not wishing to be forced into a situation where as a new ("successor") employer it would be bargaining with a union which did not represent its employees, the Petitioner conducted a noncoercive, secret-ballot poll of its employees in strict compliance with the standards established by the Board for such polls.[12] (P.O.S.A. 80-85) Although the poll results were an overwhelming rejection of the union, the Petitioner was under an order of the NLRB to bargain as a "successor" employer and therefore found itself in the unenviable situation of being required to bargain with a union which clearly did not represent its employees.

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[12] None of the parties has ever asserted that the poll was illegal, improper or improperly conducted. The Petitioner conducted the poll in strict compliance with the conditions and standards established by the Board for such polls in Struksnes Construction Company, 165 NLRB No. 102 (1967), including secret balloting, assurances that no reprisals would be forthcoming, and opening ballots in the presence of employees to guarantee the validity of results.

Because of the difficulty for an employer to prove union majority or lack thereof, it is settled that polls are not prohibited by the Act where circumstances are brought to the employer's attention tending to show that a question exists as to representation of a union. *See, e.g.*, N.L.R.B. v. Crystal Laundry & Dry Cleaning Company, 308 F.2d 626 (6th Cir. 1962).

The inappropriateness of the application of the language in *Franks* to the Petitioner's situation and the fact that a bargaining order has been held by this Court not to be appropriate in every situation is demonstrated with great clarity in this Court's holding in the subsequent analagous case of *N.L.R.B.* v. *Gissel Packing Company, supra.* In *Gissel* this Court pointed out that there are essentially *three* types of situations involving unfair labor practices, only one of which is always appropriate for a bargaining order.[13]

The first situation, of which the *Franks* case may be an example, involves " 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices" [14] which justify a bargaining order because the employer's actions "are of 'such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had.' " [15] Such is certainly not the case presented here, where the issues in contention are a good-faith dispute of "successorship" and majority representation with no other independent unfair labor practices, particularly violations of Sections 8(a)(1), (2) or (3) of the National Labor Relations Act. The

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[13] The *Gissel* case involved a pre-election/pre-recognition situation where the union was demanding recognition based on authorization cards. The instant matter involves what might be called a "withdrawal of recognition" situation. However, the Courts of Appeals for the Fifth and Sixth Circuits have applied the rationale of *Gissel* to withdrawal of recognition situations. *See, e.g.*, Automated Business Systems v. N.L.R.B., *supra,* and Daisy's Originals, Inc. of Miami v. N.L.R.B., 468 F.2d 493 (5th Cir. 1972).

[14] N.L.R.B. v. Gissel, *supra,* 395 U.S. at 613.

[15] *Id.,* 395 at 614.

effect of the Court of Appeals' affirmance of the Board's order, however, was to place the Petitioner in the first situation just described without any consideration of the critical and unique facts.

The Petitioner contends that the Board and Court of Appeals improperly relied on *Franks* and thereby violated fundamental legal and practical principles with respect to the two remaining types of situations stated in *Gissel*. This Court held in *Gissel* that a bargaining order is never called for where the unfair labor practices complained of "are of a minor and less extensive" nature and "because of their minimal impact on the election machinery will not sustain [a] bargaining order."[16] The Court in *Gissel* also considered those instances where unfair labor practices exist but are of a lesser order than those "outrageous" and "pervasive" practices which are so "flagrant" as to absolutely require a bargaining order and which, before a bargaining order may issue, require a balancing of ascertainable employee free choice with deterring employer misbehavior.[17]

Applying the rules prescribed by this Court in *Gissel,* it is apparent that the bargaining order here is inappropriate for enforcement. The clear lack of majority support for the union (P.O.S.A. 80-85), evidence of which was prompted by the union's own actions (P.O.S.A. 78-80), and the fact that the lack of majority was not due to employer unfair labor practices (and that a free election was not prevented) require the finding that a bargaining order is inappropriate in this

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[16] *Id.*, 395 U.S. at 615.

[17] *Id.*, 395 U.S. at 614.

situation. *See Daisy's Originals, Inc of Miami* v. *N.L.R.B.*, 468 F.2d 493 (5th Cir. 1972); *N.L.R.B.* v. *Anvil Products,* Inc., 496 F.2d 94 (5th Cir. 1974).

In essence, the Court's decision precludes the Petitioner and other "successor" employers in similar circumstances from questioning majority support of the union or from having an election conducted, even though the employer has done nothing to undermine the union or prevent a free election. The Board's order, as affirmed by the Court of Appeals, also denies employees their right to free choice, which should be the ultimate concern and goal of both the Board and the courts in such situations.

Finally, as we have demonstrated, if enforcement of the Board's bargaining order is permitted to stand under the existing circumstances, that bargaining order will be improperly based upon a narrow principle enunciated by this Court which is inapposite here and which in any event is inconsistent with more recent, broader principles announced by this Court in analagous pre-election circumstances.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

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FLAV-O-RICH, INC., *Petitioner,*

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NATIONAL LABOR RELATIONS BOARD, *Respondent.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 76-1786

FLAV-O-RICH, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Order

(FILED OCTOBER 26, 1976)

Before: PHILLIPS, *Chief Circuit Judge* and CELEBREZZE and LIVELY, *Circuit Judges.*

This matter is before the Court upon the motion of the National Labor Relations Board to submit the case without further briefs or oral argument, or in the alternative for summary enforcement, and the response of Petitioner Flav-O-Rich thereto.

In an opinion published at 531 F.2d 358 (6th Cir. 1976), this Court denied enforcement of the order of the Board reported at 212 N.L.R.B. No. 144 (1974) and remanded the case to the Board for further proceedings. Thereafter on June 11, 1976, the Board entered its Supplemental Decision and Order, reported at 224 N.L.R.B. No. 88.

Having carefully considered the transcript of record filed in this cause, and being fully advised in the premises, and having determined that the Motion of the National Labor Relations Board for Summary Judgment without oral argument is well taken.

It is therefore ORDERED, ADJUDGED and DECREED that the Motion for Summary Judgment be and it is hereby granted, and the Board's Supplemental Order of June 11, 1976 be enforced.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
John P. Hehman
Clerk

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 9-CA-8146

FLAV-O-RICH, INC.

and

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 175, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Supplemental Decision and Order

On August 19, 1974, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended, and ordering Respondent to cease and desist therefrom and take certain affirmative actions to remedy such unfair labor practices.

Thereafter, on October 3, 1974, Respondent filed with the Board a "Motion to Abate Proceedings and Reopen Record." In its motion, Respondent alleged that it "now has a good faith doubt" of the Union's majority status based on a poll of the employees in the bargaining unit conducted by Respondent on September 16, 1974. Respondent further alleged that this poll conformed to the requirements set forth by the Board in *Struksnes Construction Co., Inc.*, 165 NLRB 1062 (1967), and that the results of the poll indicated that a majority of the employees did not support the Union. Respondent also stated that it was petitioning for an election to test the Union's majority. The motion requested the Board to abate proceedings pending the out-

[1] 212 NLRB 930.

come of such election or to reopen the record to allow Respondent to introduce the poll and other evidence of the Union's alleged lack of majority support. On October 31, 1974, the Board issued an order denying Respondent's "Motion to Abate Proceedings and Reopen Record."

Respondent thereupon petitioned the United States Court of Appeals for the Sixth Circuit to review the orders of the Board. The Board filed a cross-application for enforcement of its bargaining order. On March 1, 1976, the court granted Respondent's petition for review, denied the Board's cross-petition for enforcement, and remanded the case for reconsideration of Respondent's "Motion to Abate Proceedings and Reopen Record."[2] In remanding, the court held that the Board committed two procedural errors in connection with Respondent's "Motion to Abate Proceedings and Reopen Record": (1) the Board failed to disclose the reasoning behind its denial of Respondent's motion, and (2) there was no indication that the Board members themselves personally considered and decided the issues raised by the motion.[3]

Thereafter, on April 16, 1976, the Board advised the parties that it had decided to accept the remand and that they might submit statements of position with respect to the issues raised by the remand. On May 3, 1976, the General

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[2] *Flav-O-Rich, Inc.* v. *N.L.R.B.*, 91 LRRM 2545, 78 LC ¶ 11,300 (C.A. 6, 1976).

[3] In its brief to the court, the Board conceded that its records did not affirmatively disclose whether all three Board Members who had originally decided this case had themselves considered Respondent's motion. At the time the Board's Order issued denying Respondent's motion, the Board Members' chief counsels were authorized to concur on their behalf in the denial of the reopening of any record in a decided case where the grounds asserted for reopening were wholly without merit. The Board subsequently revised its procedures so as to assure the personal participation of the Board Members in all such motions.

Counsel filed a "Statement of Position Regarding Disposition of Case on Remand."[4]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In its original decision, which issued on August 19, 1974, the Board found that Respondent was the successor employer to the Leatherwood Company and was therefore under a duty to bargain with the incumbent Union as the collective-bargaining representative of an appropriate unit of its employees.[5] Accordingly, the Board found that Respondent violated Section 8(a)(5) and (1) by refusing to bargain with the Union after taking over the Leatherwood operations on November 1, 1973, and by refusing to bargain with the Union on and after November 19, 1973, concerning the effects of closing the Bluefield, West Virginia, processing plant.

It is well established that a successor employer is bound by a presumption of continued majority support "unless it demonstrates that the union no longer represents a majority of employees on the date of the refusal to bargain, or that the refusal to bargain was grounded on a good faith doubt of the union's majority status."[6] In the original Board proceeding in this case, Respondent asserted that it had reasonable grounds for doubting the Union's majority status as of the refusal-to-bargain date, but this contention

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[4] Also on May 3, 1976, the Board received a letter from Respondent which stated that its position has been fully set forth in prior submissions to the Board and the court of appeals and that Respondent was declining at this time to make a further submission.

[5] In its decision, the court of appeals affirmed the Board's successorship finding. 91 LRRM at 2546.

[6] *N.L.R.B.* v. *Wayne Convalescent Center, Inc.*, 465 F.2d 1039, 1043 (C.A. 6, 1972).

was rejected by the Board.[7] In its "Motion to Abate Proceedings and Reopen Record," Respondent did not advance any new evidence relating to its earlier claim that it had a reasonable doubt as to the Union's majority status on the date it refused to bargain. Rather, Respondent contended that it was not required to bargain with the Union because it "now has a good faith doubt" of the Union's majority support based on a poll it conducted on September 16, 1974, approximately 11 months after its refusal to bargain and 1 month after the Board's decision.

Assuming *arguendo* the truth of the allegations in Respondent's motion, we conclude that under well-established legal principles the claim of loss of majority arising after the Board's decision is not a defense to the Board's 8(a)(5) findings and bargaining order. In the instant case, the alleged loss of majority occurred almost a year after Respondent unlawfully refused to bargain with the Union. The Supreme Court has long recognized that such an unfair labor practice 'disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions.'"[8] Under these circumstances, to allow an employer to rely on a union's subsequent failure to retain majority status would result in permitting the employer "to profit from [its] own wrongful refusal to bargain."[9] Similarly, were we to accede to Respondent's alternative request and order an election when it is claimed that a union has lost its majority support subsequent to or

> during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their

[7] 212 NLRB 930, 933, fn. 4.

[8] *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702, 704 (1944).

[9] *Id.*

> statutory obligation. In the Board's view, procedural delays necessary fairly to determine charges of unfair labor practices might in this way be made the occasion for further procedural delays in connection with repeated requests for elections, thus providing employers a chance to profit from a stubborn refusal to abide by the law.[10]

For these reasons, the Court held in *Franks Bros.* that the Board may require that "an employer bargain exclusively with the particular union which represented a majority of the employees at the time of the wrongful refusal to bargain despite that union's subsequent failure to retain its majority."[11]

The Supreme Court's decision in *N.L.R.B.* v. *Mexia Textile Mills, Inc.*[12] is particularly relevant to the issues presented here, for in that case, as in the instant case, the employer alleged that after the record was closed "it had come to the conclusion that the Union no longer represented a majority of employees in the bargaining unit." In regard to this contention, the Court held as follows: "That the respondent doubts the Union's ability to muster a majority of the employees in the bargaining unit does not justify the denial of an enforcement decree."[13]

Similarly, in *N.L.R.B.* v. *S. H. Kress & Co.*,[14] the employer contended that it was no longer required to bargain because the union had lost its majority after the issuance of

[10] *Id.* at 705.

[11] *Id.*

[12] 339 U.S. 563, 566 (1950).

[13] *Id.* at 568. See also *N.L.R.B.* v. *Katz*, 369 U.S. 736, 748, fn. 16 (1962); *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96, 102-103 (1954).

[14] 194 F.2d 444, 446 (C.A. 6, 1952).

the Board's order. The court rejected this argument, stating:[15]

> Assuming without determining that the Union had lost its majority after that time, this contention is unsound. The bargaining relationship continued for a reasonable period in which it could be given a *fair chance. Franks Bros. Co. v. N.L.R.B.*, 321 U.S. 702. . . . Our view is that because of procedural delays caused by respondent as above indicated the bargaining relationship never had a fair chance.

In sum, we find that by its continued refusal to bargain with the Union on and after November 1, 1973, Respondent has failed to give bargaining "a fair chance to succeed"[16] and therefore cannot now rely upon the Union's alleged loss of marjority as a defense to the Board's 8(a)(5) findings and bargaining order. In view of the foregoing, we hereby deny Respondent's "Motion to Abate Proceedings and Reopen Record" on the ground that the facts alleged therein are wholly immaterial to the Board's initial Decision and Order. Accordingly, we reaffirm our original Decision and Order in this proceeding.[17]

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[15] *Id.*

[16] *Franks Bros., supra,* 321 U.S. at 705.

[17] On March 11, 1976, Respondent filed a motion with the Board for an order reinstating its RM petition of October 2, 1974, which had been dismissed by the Regional Director for Region 9. Alternatively, Respondents requested that an election be conducted pursuant to a new RM petition filed by it on March 8, 1976. In view of our finding herein that Respondent is obligated to bargain with the Union despite the alleged loss of majority support, Respondent's motion is hereby denied on the ground that "it is the Board's established policy to dismiss pending representation petitions upon the issuance of a bargaining order. Underlying this policy is the principle that a petition, which presupposes the presence of a question concerning representation, and a bargaining order, which necessarily rests on the absence of a question concerning representation, are inherently inconsistent and, therefore, may not concurrently exist." *Riviera Manor Nursing Home, Inc.*, 220 NLRB No. 23 (1975).

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby affirms as its Order the Order heretofore entered in this proceeding on August 19, 1974.

Dated June 11, 1976, Washington, D.C.

(SEAL)

JOHN H. FANNING, *Member*

HOWARD JENKINS, JR., *Member*

JOHN A. PENELLO, *Member*

NATIONAL LABOR RELATIONS BOARD

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 9—CA-8146

FLAV-O-RICH, INC.

and

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 175, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Decision and Order

On April 24, 1974, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order, as modified herein.

The complaint alleges, *inter alia*, that Respondent unilaterally changed the terms of employment provided for in an existing collective-bargaining agreement between the Union and Respondent's predecessor. The Administrative Law Judge found that the record indicates that Respondent asked the old employees to stay on with no changes in their pay or other benefits. Despite this finding, as part of his "Remedy" section, the Administrative Law Judge stated:

> It may nevertheless be that changes in conditions were made, and that they may have been adverse to the interests of the employees. The remedial order will therefore provide that the question be looked into at the compliance stage, and in the event the Respondent did in fact reduce any of the economic benefits of the employees, it now reimburse them and restore the status quo ante. This is not a matter of ordering the Respondent to abide by the contract which its predecessor had with the Union, but rather to undo the effect, if any, of unilateral changed [sic] in conditions of employment it made when it was under a statutory duty to bargain with the Union.[1]

In our view, the effect of this provision is to provide a remedy for a violation which was alleged but not proved. Accordingly, we shall delete this provision from the recommended Order.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that Respondent, Flav-O-Rich, Inc., Bluefield, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as modified below:

Delete paragraph 2(b) of the recommended Order of the Administrative Law Judge and reletter the following paragraphs accordingly.

Dated August 19, 1974, Washington, D.C.

JOHN H. FANNING, *Member*
HOWARD JENKINS, JR., *Member*
JOHN A. PENELLO, *Member*
NATIONAL LABOR RELATIONS BOARD

[SEAL]

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[1] Administrative Law Judge's Decision at sec. IV.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES
WASHINGTON, D. C.

Case No. 9-CA-8146

FLAV-O-RICH, INC.

and

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION No. 175, affiliated with THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Stuart J. Blenner, Esq.,
for the General Counsel.
M. Brooks Senn, Esq., of
Louisville, Kentucky,
for the Respondent.

Decision

STATEMENT OF THE CASE

THOMAS A. RICCI, A.L.J.: A hearing in this proceeding was held on March 7, 1974, at Bluefield, West Virginia, on complaint of the General Counsel against Flav-O-Rich, Inc., herein called the Respondent. The charge was filed on November 16, 1973, by Chauffeurs, Teamsters and Helpers Local Union No. 175, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Teamsters 175, or the Union. The complaint issued on January 24, 1974. The issue of the case is whether the Respondent, in refusing to bargain upon request with Teamster Local 175, violated Section 8(a)(5) of the statute. Briefs were filed by the General Counsel and the Respondent.

Upon the entire record, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. The Business of the Respondent

Flav-O-Rich, a Kentucky corporation, is engaged in the processing and distribution of dairy products throughout several states, including West Virginia, and during the past 12 months, a representative period, in the course of its business it derived income in excess of $50,000 from the sale of dairy products to customers outside the State of West Virginia. I find that the Respondent is engaged in commerce within the meaning of the Act.

II. The Labor Organization Involved

I find that Chauffeurs, Teamsters and Helpers Local Union No. 175, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practice

Flav-O-Rich has for sometime operated in many states, and still does. Its business consists entirely of processing and distributing milk and related dairy products. It purchases milk in great quantities from members of Dairyman's Inc., a very large cooperative, brings it into its processing plants, trucks the then processed milk, cheese, etc., to a much larger number of distribution points—these are refrigeration units and delivery truck loading places—, and from there sells it to various wholesale customers, its route salesmen operating regular rounds out of the distribution locations. The Leatherwood Company, a smaller enterprise, for a number of years has engaged in exactly the same kind of business—processing and distributing milk and dairy products. It had only one processing plant, in

Bluefield, West Virginia, and seven distribution points, one adjacent to the processing plant and the other six in different towns in Virginia and Tennessee. Leatherwood bought 95 percent of its milk from members of Dairyman's Inc., as does Flav-O-Rich, and the remaining 5 percent it produced itself on a farm which it owned and operated in its own name. At the end of October, 1973, Leatherwood sold its entire processing and distribution business to Flav-O-Rich, and on November 1, the second company took over.

Teamster Local 175, the Charging Party here, was the collective-bargaining agent for most of Leatherwood's employees; it was certified by the Board on May 28, 1971, and its last contract with Leatherwood by its terms extended to November 30, 1973, with provision for automatic annual renewal thereafter absent written notice of a contrary intention by either party. The employee unit covered by the contract included all of Leatherwood's nonsupervisory employees except (1) those who worked on its farm—apparently agricultural workers, and (2) the employees at only one of its distribution points—the one in Williamson, West Virginia.[1] The Williamson employees were represented under contract with another union—identified on the record only as District 50, or the Steelworkers.

During October Teamster Local 175, advised by Leatherwood of the planned sale, and desirous of discussing a new

[1] The bargaining unit as set out in the Board's certification, and as then represented by Teamster Local 175 vis-a-vis Leatherwood, is as follows:

> All employees of the employer at its Bluefield, West Virginia; Beckley, West Virginia; Kimball, West Virginia; Christiansburg, Virginia; Narrows, Virginia, and Bristol, Tennessee, locations, including all production and maintenance employees, trailer drivers, retail and wholesale route drivers, route driver helpers, mechanics, cooling room and shipping and receiving employees, but excluding all office clerical employees, all empoyees at the Williamson, West Virginia location, guards and supervisors as defined in the Act.

contract to follow that due to expire at the end of November, wrote to Flav-O-Rich, informing it of Local 175's representative status and asking that it bargain with the Union. On October 29, 1973, Flav-O-Rich's lawyers responded by saying that while their client contemplated making the purchase, it did not intend to and would not recognize Local 175 or bargain with it.

The complaint calls Flav-O-Rich the successor to Leatherwood within the meaning of the Board's decisional precedents, and therefore alleges that the Respondent's refusal to recognize Teamster Local 175 constituted a violation of Section 8(a)(5) of the Act. The defense is simply that the Respondent is not a successor to Leatherwood and that therefore none of the Board's past rulings apply to it.

Successorship

Like all cases of this kind the answer to whether a named respondent is or is not a successor employer, and for that reason obligated to bargain with the established collective-bargaining agent, is one of fact and is determined by the pertinent objective factors. There is no substantial question at all on this record as to what the underlying facts are.

(1) Flav-O-Rich bought Leatherwood's business, lock, stock and barrel. There were seven locations altogether; where Leatherwood owned the reality, Flav-O-Rich took title; where there was a lease on the property, the purchaser assumed the lease—either a monthly one or an annual one. It bought all the equipment—processing machinery in Bluefield, cold storage facilities in the distribution depots, trucks and trailers, and whatever else the seller was using in its operations.

(2) Leatherwood was buying 95 percent of its raw milk from members of Dairyman's Inc.; Flav-O-Rich started

right away and continued to buy all it from the same source.

(3) All of Leatherwood's customers forthwith became Flav-O-Rich's customers.

(4) I find on the total record that every one of the 56 rank-and-file employees working for Leatherwood on October 31, 1973 (this number excludes the farm employees and those at the Williamson distribution plant who were represented by another union) were immediately hired by Flav-O-Rich and started working for it on November 1. Charles Walker, president of Leatherwood, worked as advisor to Flav-O-Rich during the month of November 1973. Asked as a witness whether it was exactly the same complement of employees that moved immediately with the business, he answered: "approximately all of them." Eric Morgan, vice-president of Dairyman's Inc., owner of Flav-O-Rich, was asked "were there any changes made in the composition of the labor force," and said "There were very few changes made." On about October 25 officers of the Respondent invited the bulk of these employees, perhaps 40, to a dinner party with their wives to request all of them to continue their work as before but with Flav-O-Rich. A separate meeting with about 15 employees at Bristol was held for the same purpose at about the same time. Morgan said "most, if not all, to the best of my knowledge, signed up to work for Flav-O-Rich." Morgan also agreed "the work force that was employed at those locations are essentially the same," and at a later point in his testimony he said: "The employees that were hired by Flav-O-Rich were essentially those employed by Leatherwood." The parties stipulated that on November 1, 1973 there were 56 nonsupervisory employees at work for Flav-O-Rich at these locations, and that the same full complement of 56 was still there on November 23.

(5) The work duties of all these employees did not change with the new company.[2] The processing plant employees continued to work as before, the checkers and loaders in the depots kept checking things and helping the route drivers as a whole, the driver salesmen or route salesmen kept right on making their rounds everyday, along the familiar established routes, and selling to the same old customers. Indeed, the new company made every effort not to rock the boat, by continuing Leatherwood's name on the trucks and on the containers for its products for quite some time. It did not want to "upset" its wholesale customers or the housewives who buy the milk and cream at retail. With time Flav-O-Rich started to put its own name on the cartons and to edge Leatherwood's name away, one day intending to remove it altogether.

I find that the Respondent is the successor to the Leatherwood Company's processing and distribution business and as such was obligated to bargain with Teamster Local 175 with respect to those employees who were represented by that union when the transfer of business took place. "The critical question is . . . whether Respondent continued essentially the same operation, with substantially the same employee unit whose duly certified bargaining representative was entitled to statutory recognition at the time Respondent took over." *Maintenance, Inc.*, 148 NLRB 1299. The facts of this case fit squarely into this test, reaffirmed again and again in later Board decisions. Flav-O-Rich not only hired "substantially" the old existing complement of workers, but it continued all of them on its own payroll. It changed not an iota of the old

[2] "The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." *John Wiley and Sons* v. *David Livingston*, 376 U.S. 543.

business, and in fact took pains lest there even appear the least semblance of change. The employees continued their regular work exactly as they had always performed it. In fact, nothing changed at all so far as their conditions of employment were concerned. It is successor of "employment" that matters, and not successor of employers. *N.L.R.B.* v. *McFarland,* 306 F. 2d 219 (C.A. 10).

In the attempt to avoid this successorship finding the Respondent relies upon the testimony of Morgan, its vice-president, who spoke of internal changes that were made in his company's managerial hierarchy in consequence of the purchase of Leatherwood's business. Because Flav-O-Rich had a number of large, established processing plants, it soon started to send milk to the newly acquired distribution points from them, rather than from the old Leatherwood processing plant in Bluefield, West Virginia. With this, high management control over the new distribution points was shifted away from Leatherwood's old central office—from which, of course, there could no longer be any supervision anyway—and placed under the jurisdiction of this or that divisional manager of the larger company. And starting the day after November 23, but not earlier, Flav-O-Rich discontinued the processing operation at Bluefield altogether, abolishing 12 jobs. The greater portion of the operation there—the distribution function with the largest group of route salesmen that Leatherwood had passed on to the purchaser—remained as it was, the Respondent buying the property which Leatherwood had leased and even adding to it. The 12 plant employees were all offered other jobs, two accepted jobs inside Teamster Local 175's old unit, two went to other Flav-O-Rich installations and eight left the Company. The only other change that was made in the method of operating Leatherwood's old business, is that shortly before the hearing in this case, 4 months after the takeover, the Christiansburg distribution depot—where only three or four employees worked—

was closed, and its work, together with these employees, was moved into the Narrows depot, not far away.

Morgan detailed how Flav-O-Rich operates internally in a number of other respects, presumably in support of a defense contention that the bargaining unit which his company bought no longer exists, or ceased being feasible for bargaining purposes in consequence of the purchase. None of the things he spoke about bears any relationship to the work of the employees involved, and, most important, none affects their conditions of employment either directly or indirectly. Apparently Leatherwood's central office used to be in Bluefield, and necessary supplies and equipment were purchased from there, decisions as to pricing were made there, the accounts of the business were maintained at that location, and bills were paid out of that office. Morgan said all this is now being decided and done at Flav-O-Rich's central office in Columbus, Georgia, and some of it at its divisional suboffices. He added: ". . . we are on our way of putting it in all, complete centralized route accounting on computers."[3] As to the lower echelon of supervision, the immediate supervisors who had come with the Leatherwood business and who remained at the same locations doing the same work, Morgan said: "I would describe it as essentially the same."

What counts in these cases is the work the employees do. As to this Morgan's relevant testimony is this: "Q: Were there any changes in task assignment at the various

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[3] A good summary of Morgan's total burden in his testimony appears in his following statement as a witness:

> So the top management decisons that heretofore had been made here at Bluefield under the ownership of the old Leatherwood organization primarily by Mr. Walker and in our instance is divided into three existing divisions, with the top management decision in each of these divisions resting in the division manager of that position which he is, in my opinion, very basic change in management.

locations set up mentioned previously? A. There may have been minor ones. It could have been there were changes in route structure, but they would be very minor in nature. We would say essentially they were performing the same task. Q: Drivers, salesmen? A. And supervisors. They were performing essentially the same tasks."

This language, coupled with the fact the Respondent immediately hired the full complement of employees used by its predecessor, places the case precisely within the phrase "continuity of the employing industry" used in case after case.

I conclude that by refusing to bargain with Teamster Local 175 on November 1, 1973, the Respondent violated Section 8(a)(5) of the Act.[4] There is a final clear contention emerging from the totality of Morgan's testimony, and it is that big business cannot be profitable, or suffi-

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[4] *N.L.R.B.* v. *Burns*, 406 U.S. 272; *Tom-A-Hawk Transit, Inc.* v. *N.L.R.B.*, 419 F. 2d 1025, (C.A. 7).

In its brief the Respondent argues for dismissal of the complaint on two additional grounds. It simply states that the record proves that the employees were initially hired on an economic basis totally different from the conditions of employment they had enjoyed with Leatherwood, and that there was reasonable grounds for the new company to doubt the Union's majority status on November 1. The first assertion is in no sense supported by the evidence. All Morgan, the new vice-president, did on October 25, as he testified, was "encouraged them to become employees of Flav-O-Rich," "welcome to the family," "we needed good people." He said nothing about changing their conditions of employment. He did tell them the Respondent had no intention of recognizing their union. It is now the position of the Respondent that because the employees at that moment did not openly protest this announced refusal, it follows the employees no longer wished to be represented by the Union. Neither their silence then, nor the fact the Respondent during November stopped the predecessor's practice of checking off their union dues, as the current contract called for, serves at all to negate the presumption of continuing majority status of the Union as evidenced by the contract.

ciently profitable, if management must deal with unions. At some points he seemed to be saying also that this company is too large to deal with any union on the basis of only a portion of its operations. This would be an unpersuasive argument if only because Morgan also said District 50, or the "Steelworkers," represents employees at one of its processing plants, plus the Williamson distribution point purchased from Leatherwood. In any event, it is too late a day in history to attempt to defeat a refusal to bargain complaint under this statute on the ground that collective bargaining trenches upon the proper interest of management in making money.

Flav-O-Rich's plan to close down entirely the Bluefield processing plant, with its 12 in-plant employees, came to the attention of Local 175 on November 16. The Union therefore wrote to the Respondent and demanded it bargain with the Union not only with respect to contract renewal, but also with respect to any questions that were pertinent to the planned discontinuance of the Bluefield processing plant. It wanted to discuss questions of possible layoffs of the employees who might be affected. And again, by letter dated the 19th, the Respondent refused to extend any recognition or to meet with the Union at all. This was another clear violation of Section 8(a)(5) of the Act, and I so find. The Respondent's statutory duty to recognize Local 175 was clear, for indeed by that date nothing had changed at all, and the full 56-men complement of old was still in its direct employment.

IV. The Remedy

The cardinal element in the remedial order now required is that the Respondent cease refusing to recognize and to bargain with the Union and that it now in good faith meet and negotiate with it as the statute requires. No question here as to when the duty to bargain arose, for clearly the Respondent knew in advance of the sale that the Union was the established exclusive representative of the employees

it took over, and from the very beginning it intended to and in fact did hire all of the employees of its predecessor. *N.L.R.B.* v. *Polytech,* 469 F.2d 1226 (C.A. 8). It was the clearest unfair labor practice on the 1st of November. The General Counsel, as part of the appropriate remedy, asks that the employees be made whole for any economic hurt they may have suffered in consequence of the Respondent departing from the contract provisions in the Union's then agreement with the predecessor. That matter was not explored at the hearing. Rather, the record indicates that Flav-O-Rich asked the old employees to stay on with no changes in their pay or other benefits. It may nevertheless be that changes in conditions were made, and that they may have been adverse to the interests of the employees. The remedial order will therefore provide that the question be looked into at the compliance stage, and in the event the Respondent did in fact reduce any of the economic benefits of the employees, it now reimburse them and restore the staus quo ante. This is not a matter of ordering the Respondent to abide by the contract which its predecessor had with the Union, but rather to undo the effect, if any, of unilateral changes in conditions of employment it made when it was under a statutory duty to bargain with the Union. See, *Denham Co.*, 206 NLRB No. 75.

Conclusions of Law

1. By refusing to bargain with the Union on November 1, 1973, and thereafter, concerning wages, hours and other terms and conditions of employment in the unit found appropriate herein, and by refusing to bargain with the Union on November 19, 1973, and thereafter, concerning the effect of the Respondent's decision to discontinue its processing plant operation in Bluefield, West Virginia, the Respondent has violated and is violating Section 8(a)(5) and (1) of the Act. The unit appropriate for the purposes of collective bargaining now is:

> All employees of the Respondent at its Bluefield, West Virginia, Beckley, West Virginia, Kimball, West Virginia, Narrows, Virginia, and Bristol, Tennessee, locations, including all production and maintenance employees, trailer drivers, retail and wholesale route drivers, route driver helpers, mechanics, cooling room and shipping and receiving employees, but excluding all office clerical employees, guards, and supervisors as defined in the Act.

2. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[5]

Order

The Respondent, Flav-O-Rich, Inc., Bluefield, West Virginia, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain with Chauffeurs, Teamsters and Helpers Local Union No. 175, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, on request, concerning all terms and conditions of employment as the exclusive collective-bargaining agent of the employees in the unit here found appropriate, and refusing to bargain with that Union concerning the effect of the Respondent's decision to discontinue its processing plant in Bluefield, West Virginia.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their

[5] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain with the Union as the exclusive bargaining representative of all employees in the unit here found appropriate concerning all terms and conditions of employment, and with respect to the effect upon the employees of the Respondent's decision to close its processing plant in Bluefield, West Virginia, and if an understanding is reached, embody it in a signed agreement.

(b) In the event it should appear upon investigation hereafter that the Respondent made any unilateral changes in the conditions of employment of the employees on November 1, 1973 or thereafter, make restitution to the employees for any benefits which may have been lost by virtue of the unilateral changes in terms and conditions of employment until such time as a new collective-bargaining agreement is executed between it and the Union.

(c) Post at each of the five locations purchased from the Leatherwood Company and still being operated by the Respondent at the time of the hearing herein, copies of the notice attached hereto and marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for the Ninth Region, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for

[6] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Decision, what steps the Respondent has taken to comply herewith.

Dated at Washington, D. C.

/s/ Thomas A. Ricci
Thomas A. Ricci
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board Having Found, After a Trial, That We Violated the Federal Law by Refusing To Bargain With the Statutory Collective-Bargaining Representative of Our Employees:

We Will Not refuse to bargain in good faith, upon request, with Chauffeurs, Teamsters and Helpers Local Union No. 175, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining agent of all our employees in the unit described below.

We Will, upon request, bargain with that Union concerning all terms and conditions of employment of all the employees in that bargaining unit, and concerning the effect upon the employees of our decision in November of 1973 to discontinue our processing plant in Bluefield, West Virginia.

The bargaining unit is:

All our employees in our Bluefield, West Virginia, Beckley, West Virginia, Kimball, West Virginia, Narrows, Virginia, and Bristol, Tennessee, locations, including all production and maintenance employees, trailer drivers, retail and wholesale route drivers, route driver helpers, mechanics, cooling room and shipping and receiving employees, but excluding all office clerical employees, guards, and supervisors as defined in the Act.

FLAV-O-RICH
(Employer)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions must be referred to the Board's Office, Federal Office Building, Room 3003, 550 Main Street, Cincinnati, Ohio (Tel. No. (513) 684-3686).

APPENDIX D

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 9-CA-8146

FLAV-O-RICH, INC.

and

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 175, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Order Denying Motion

On August 19, 1974, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding.[1] On October 3, 1974, the Respondent filed a Motion to Abate Proceedings and Reopen Record be, and it hereby is, Charging Party filed a Statement in Opposition to Respondent's Motion.

The Board having duly considered the motion.

IT IS HEREBY ORDERED that the Respondent's Motion to Abate Proceedings and Reopen Record be, and it hereby is, denied.

Dated, Washington, D.C., October 31, 1974.

By direction of the Board:

GEORGE A. LEET

/s/ _____
Associate Executive Secretary

[1] 212 NLRB No. 144.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 75-1032

FLAV-O-RICH, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

(DECIDED AND FILED MARCH 1, 1976)

Before: PHILLIPS, Chief Circuit Judge, and CELLEBREZZE and MILLER, Circuit Judges.

CELEBREZZE, Circuit Judge. This case is before the Court on the petition of Flav-O-Rich, Inc., to review two related orders of the National Labor Relations Board. The first challenged order was issued on August 19, 1974 following the Board's decision that Petitioner had violated section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) and (1) (1970), by refusing to bargain with a union certified as collective bargaining representative for a number of its employees.[1] The second order for which review is sought was issued on October 31, 1974 wherein the Board denied Petitioner's Motion to Abate Proceedings and Reopen the Record to receive the results of an employee poll which indicated that the Union had lost its majority. The Board has filed a cross-application seeking enforcement of its bargaining order. This Court has jurisdiction of the proceedings under section 10(e) and (f) of the Act, 29 U.S.C. § 160(e), (f) (1970), because Flav-O-Rich is a Kentucky corporation with its principal place of business in Louisville, Kentucky and because the alleged

[1] *Flav-O-Rich, Inc.*, 212 NLRB No. 144 (1974).

unfair labor practices occurred in part at the Company's facilities in Bristol, Tennessee.

The controversy arose when Flav-O-Rich, a company engaged in processing and distributing milk in Kentucky, agreed to purchase the milk processing and distribution assets of the Leatherwood Company, a smaller enterprise which provided a similar service to communities in West Virginia, Virginia and Tennessee. After the purchase agreement had been finalized, Teamsters Local 175,[2] the certified bargaining representative for most of Leatherwood's employees since May 28, 1971, contacted Flav-O-Rich and requested it to bargain over the collective bargaining agreement which was due to expire on November 30, 1973. Flav-O-Rich declined to bargain with the Union indicating that it had no duty to bargain because it was not a "successor employer" to Leatherwood and because it had a "good faith doubt" that the Union continued to enjoy majority status among the employees. On November 1, 1973, Flav-O-Rich acquired the distribution and processing assets of Leatherwood. The Company persisted in its refusal to bargain with the Union over renewal of the contract. It also rejected a Union request to bargain over the effects of its decision to close its distribution depot at Bluefield, West Virginia.

After unfair labor practice charges were filed and a hearing was held, an Administrative Law Judge concluded that Flav-O-Rich was a successor employer to Leatherwood with a duty to bargain. On August 19, 1974, the Board agreed that Flav-O-Rich was successor to Leatherwood and we affirm this finding. The Board also affirmed the Judge's conclusion that Flav-O-Rich had violated Sections 8(a)(5) and (1) of the Act and ordered the Company to bargain with the Union. Sometime after the Board's decision and

[2] Chauffeurs, Teamsters and Helpers Local Union No. 175, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

the posting of appropriate notices, the Company claims that it received new evidence that the Union no longer enjoyed majority support. In order to test the Union's majority status, the Company conducted a poll of the employees in the bargaining unit which it asserts conformed to the requirements set forth in the Board's decision in *Struksnes Construction Co., Inc.*, 165 NLRB 1062 (1967). The poll indicated that an overwhelming number of employees did not support the Union. Armed with the results of the poll, the Company filed with the Board a Motion to Abate Proceedings and Reopen the Record to receive evidence of the Union's lack of support. The Company also petitioned for an election to test the Union's support.

On October 31, 1974, the Board summarily denied the Company's Motion to Abate Proceedings and Reopen the Record without providing a statement of reasons for the denial. Simultaneously, the Regional Director dismissed the Company's election petition. The Company thereupon petitioned this Court to review the orders of the Board. After filing of the record in these proceedings, the Board requested that it be allowed to withdraw the record in order to reconsider the Company's Motion to Abate Proceedings and Reopen the Record. The stated reason for the Board's request was that its records did not disclose whether the members of the Board who had originally decided this case had personally considered the Company's Motion to Abate and Reopen.[3] This Court denied the request to withdraw the record. Notwithstanding our denial of the request, the Board has apparently drafted an order reconsidering and denying the Company's motion signed by three members of

[3] The Board's review of its records was apparently occasioned by a lawsuit brought by Flav-O-Rich in the Western District of Kentucky under the Freedom of Information Act, 5 U.S.C. § 552 (1970), seeking disclosure of any information and reasoning underlying the Board's order denying the Motion to Abate Proceedings and Reopen the Record. The District Court has ordered full disclosure and the matter is pending.

the Board and purporting to explain the basis for the dismissal of the original motion.[4] This order is patently defective since it was entered at a time when the Board was without jurisdiction to modify its earlier decree. *See* 29 U.S.C. section 160(d) (1970); 29 C.F.R. 102.49 (1974). Its only relevance to this inquiry is to convincingly demonstrate that the Board has failed to recognize the seriousness of the procedural irregularities which have occurred in this case.

Petitioner cites two procedural errors as bases for denying the Board's request for enforcement of its orders: 1) The order denying the Motion to Abate Proceedings and Reopen the Record completely lacked a statement of reasons for the denial, and 2) there is no evidence that the Board members charged with the responsibility of ruling on the motion ever personally considered the motion and decided that it should be denied. We agree with Petitioner that the present procedural posture of the case renders the Board's orders inappropriate for enforcement.

The Administrative Procedure Act, 5 U.S.C. section 557 (c) (1970),[5] requires that the NLRB state reasons for denying a party's motion to reopen. *Weltronic Co.* v. *NLRB*, 419 F.2d 1120, 1124 (6th Cir. 1969). Even before enactment of the Administrative Procedure Act, the Supreme Court had held that the Board must disclose a reasoned basis for its decision before a court will effectuate

[4] The proposed order signed by Members Fanning, Jenkins and Penello was dated March 26, 1975, two days prior to the Board's initial motion to withdraw the record.

[5] The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisons, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record

its orders. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 196-197 (1941). The requirement that an agency state a reasoned basis for decision is an important element in the process of administrative adjudication and judicial review. *See Baltimore & O. R. Co.* v. *Aberdeen & Rockfish R. Co.*, 393 U.S. 87, 92 (1968). *See generally* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.12 (1958) (hereinafter DAVIS).[6] Disclosure of the reasoning underlying administrative decision-making facilitates judicial review in numerous ways: It informs the parties and the reviewing court of the grounds for disposition of the case below, *see e.g., Borek Motor Sales, Inc.* v. *NLRB*, 425 F.2d 677, 681 (7th Cir. 1970); it exposes and deters arbitrary administrative actions, *see e.g., Morton* v. *Delta Mining, Inc.*, 495 F.2d 38, 42 (3d Cir. 1974) *cert. granted*, 420 U.S. 906 (1975); and it prevents both the agency and the court from exceeding their respective jurisdictions. *See e.g., Phelps Dodge Corp.* v. *NLRB, supra* at 197; *American Federation of State, County and Municipal Emp., AFL-CIO* v. *City of Cleveland*, 484 F.2d 339, 346 (6th Cir. 1973), *C.f.* 2 DAVIS § 16.05.

The most important function to be served by a statement of the Board's reasons for denying Petitioner's motion to reopen would be to provide a basis for review. *C.f. In re Boston & P. R. Corp.*, 428 F.2d 159 (1st Cir. 1970). Our scope of review over administrative determinations is limited and we are entitled to have the benefit of the Board's expertise in this area before we are called upon to rule on important questions of law and policy. As Mr. Justice Cardozo aptly expressed it in *United States* v. *Chicago, M. P., & R.R. Co.*, 294 U.S. 499, 511 (1935): "We must know what a decision means before the duty becomes

[6] "Reasons differ from findings in that reasons relate to law, policy, and discretion rather than to facts." 2 DAVIS § 16.12 Professor Davis' distinction between reasons and findings and the requirement of both in administrative adjudication has been accepted by a number of courts. *Sete e.g., Citizens Ass'n of Georgetown, Inc.* v. *Zoning Commission*, 477 F.2d 402, 408 (D.C. Cir. 1973); *Local 467, Upholsterer's Int. Union, AFL-CIO* v. *NLRB*, 419 F.2d 179, 182 (3d Cir. 1969).

ours to say whether it is right or wrong." *See also Sec'y of Agriculture* v. *United States*, 347 U.S. 645, 654 (1954); *NLRB* v. *Madison Courier, Inc.*, 472 F.2d 1307, 1326 (D.C. Cir. 1972). We are not free to speculate on the basis of an order, *see Great Lakes Screw Corp.* v. *NLRB*, 409 F.2d 375, 379 (7th Cir. 1969), nor may we substitute our judgment for that of the Board. *See American Federation of State, County and Municipal Emp., AFL-CIO* v. *City of Cleveland, supra* at 346.

Counsel for the Board has suggested that the Court has the power to enforce an order of the Board even though it lacks a stated basis for decision if the reason for the Board's action is self-evident. Our decision in *Weltronic Co.* v. *NLRB, supra*, was cited to support that proposition. We do not believe that *Weltronic* is controlling in this instance. In *Weltronic* we indulge the presumption that the Board's unstated reason for denying the union's motion to reopen was because the company had already filed in this Court its petition for review of the Board's order. We regarded this as a valid reason for denying the motion which was firmly grounded in the Act and Board regulations.[7] Here, by contrast, Counsel asks us to hold, on the basis of an incomplete record, that the legal arguments advanced by Petitioner are so obviously without merit that they were not worthy of discussion by the Board. This we decline to do. Although we do not, at this time, express any opinion on the validity of Petitioner's arguments, we are not free to accept "appellate counsel's *post hoc* rationalization for agency action" in lieu of reasons and findings enunciated by the Board. *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 444 (1965). As the Supreme Court stated in the historic case of *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94-95 (1943), an agency's "action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order. . . . There must be a responsible finding." Since the Board has not disclosed the

[7] *See* discussion in text accompanying footnote four.

reasoning behind denial of Petitioner's motion to reopen we cannot enforce the closely related bargaining order.

The absence of a stated basis for decision may perhaps be explained by the Board's delegation of authority to its staff to review motions to reopen. In its brief, the Board concedes that its records do not affirmatively disclose whether the three Board members who had originally decided the case had themselves considered the Company's motion. In an affidavit, the members of the panel admitted that, at the time, it was a standing practice for the respective chief counsels to concur on their behalf in denial of reopening in any case where the staff felt that the grounds urged for reopening were wholly without merit.[8] Apparently this practice has since been abandoned.

It is a fundamental rule of administrative law that "[t]he one who decides [a case] must hear [it]." *United States* v. *Morgan*, 298 U.S. 468, 481 (1936). A necessary corollary of this principle is that he who decides the case must have authority to do so. Here the actual decision to deny Petitioner's motion was ostensibly made by the chief counsel and not by the Board members themselves. In our view this was an impermissible delegation of authority. A similar delegation theory was rejected by the Second Circuit in *KFC National Management Corp.* v. *NLRB*, 497 F.2d 298 (2d Cir. 1974). In that case an employer sought Board review of the decision of a Regional Director that the employer's charge of union impropriety in connection with a representational election was without merit. The Board summarily rejected the employer's petition and later rejected a petition for

[8] In an affidavit submitted to the District Court in the related Freedom of Information Act case, the three members of the panel admitted,

> That at the time that the Board's Order issued denying Respondent's Motion to Abate Proceedings and Reopen Record, our respective chief counsels were authorized to concur on our behalf in the denial of the reopening of any record in a decided case where it was clear that the grounds asserted for reopening the record were wholly irrelevant to the disposition of the case as a matter of settled Board law. . . .

reconsideration. Both petitions were reviewed by a panel consisting of one Board member and two staff attorneys authorized to vote on behalf of the two absent Board members. In disallowing the Board's delegation of decisional authority, Judge Smith, writing for a unanimous court, stated that:

> We hold no more than that the general proxies issued by the Board members to those not legally responsible for the review of representation decisions were invalid under both the statutory requirements of the National Labor Relations Act and the fundamental concepts of administrative due process. The members may, of course, continue to rely on their assistants for case summaries, legal memoranda, and draft opinions. And it may be that the Board as a whole may utilize its rule-making authority to restrict further—in a general, principled manner—its review of representation cases. If the members find the individual consideration of review petitions too burdensome, they may of course, petition Congress for further relief. So long as the Board's statutory basis and its own regulations provide for Board review of the Regional Director's decisions, however, it is the legally appointed and approved Board members, and not their staff assistants, who must make the final decisions on whether or not to grant review."
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> 497 F.2d at 306 (footnotes omitted).

The delegation of authority in this case was even broader than that in *KFC National Management Corp.* because here there is no indication that anyone with actual authority to decide the case personally considered and decided the issues raised in Petitioner's motion. Nor may the claimed insubstantiality of Petitioner's arguments excuse the invalidity of procedures adopted to rule on motions to reopen. If nothing else, Petitioner was entitled to have its motion considered by those with legal authority to pass upon it. Because Petitioner's motion to reopen has not

been legitimately reviewed by members of the Board, the bargaining order may not be enforced.

In view of the procedural errors committed by the Board in connection with Petitioner's Motion to Abate Proceedings and Reopen the Record, the proper remedy is to remand the case to the Board for corrective action. *See generally* 2 DAVIS § 16.14. Petitioner's motion and the issues raised, notably the relevance of a *Struknes* poll to the question of a successor employer's "good faith doubt" concerning the continued majority status of the Union, should receive complete consideration by a duly constituted panel of the Board. Although we realize that there is a genuine possibility that this case may return to this Court, we do not consider remand to the Board a futile gesture. *See NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 783 (Harlan, J., dissenting). *See also* DAVIS § 15.12 (Supp. 1970). There is no certainty that the result reached by the Board on remand will be the same as that of the staff attorneys in the initial review. Also, in the event Petitioner does not succeed before the Board on remand and petitions for review, at least this Court will have the benefit of a record which reflects the reasoned opinion of those individuals charged with the enforcement of the Act.[9]

We deny enforcement and remand to the National Labor Relations Board for reconsideration of Petitioner's Motion to Abate Proceedings and Reopen the Record.

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[9] The Petitioner fears that on remand the Board would merely reinstate the proposed order which it prepared while it was without jurisdiction to issue orders in this case. That order did not adequately state the basis for the decision but merely made a conclusory statement that,

> the Board, having duly reconsidered the Motion, concludes that, *inter alia, a Strukness* [sic] type poll conducted by the Employer on September 16, 1974, to determine whether a majority of the employees desired the Union, does not warrant reversal of the Administrative Law Judge's decision which issued April 24, 1974 which the Board affirmed on August 19, 1974.

On remand we expect that the Board will provide a more detailed statement of reasons underlying its decision.

No. 76-1021

Supreme Court, U. S.
FILED
APR 5 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

FLAV-O-RICH, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1021

FLAV-O-RICH, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. In its initial decision and order, issued on August 19, 1974, the Board found that petitioner (hereinafter, the Company) continued, in essentially the same form, the business operation of the Leatherwood Company, and thus was Leatherwood's "successor" and under a duty to recognize and bargain with the Union[1] which represented the operation's employees (Pet. App. 17a). The Board rejected the Company's contention that it had a good faith doubt as to the Union's majority status at the time it took over the operation (Pet. App. 20a, n. 4). Accordingly, it held that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as

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[1]Chauffeurs, Teamsters and Helpers Local Union No. 175, affiliated with the International Brotherhood of Teamsters.

amended, 61 Stat. 140, 29 U.S.C. 158(a)(5) and (1), by refusing to recognize and bargain with the Union after taking over the operation on November 1, 1973, and by refusing, on and after November 19, 1973, to bargain concerning the effects of the closing of a processing plant (Pet. App. 22a). The Board ordered the Company, *inter alia*, to bargain with the Union (Pet. App. 11a, 23a-25a).

2. On October 3, 1974, the Company filed with the Board a Motion to Abate Proceedings and Reopen Record which alleged that it "now has a good faith doubt" of the Union's representative status. The doubt was based on a poll of the employees, conducted by the Company on September 16, 1974, which assertedly showed that the Union did not then represent a majority of the employees. The Company requested the Board to abate the unfair labor practice proceeding pending the outcome of representation election which the Company was seeking, or to reopen the record of the unfair labor practice proceeding for the purpose of introducing the poll and other evidence of the Union's alleged loss of majority (Pet. App. 3a-4a). The Board, on October 31, 1974, denied the motion (Pet. App. 27a).

3. On March 1, 1976, the court of appeals upheld the Board's finding that the Company was a successor to Leatherwood and thus had a duty to bargain with the Union (Pet. App. 29a). However, the court held that the Board's order denying the Company's motion to abate failed to disclose a "reasoned basis" for that action as required by the Administrative Procedure Act (5 U.S.C. 557(c)) and judicial rulings (Pet. App. 33a-34a). Moreover, the motion had been considered and decided under an "impermissible delegation of authority" to chief counsel and had not been "legitimately reviewed by members of the Board" (Pet. App. 34a-36a). The court remanded

the case to the Board for corrective action (Pet. App. 36a).

4. On remand, a duly constituted, three-member panel of the Board considered the Company's motion to abate, and issued a supplemental decision and order fully explaining its reasons for denying the motion and reaffirming the original decision and order (Pet. App. 3a-9a). The Board noted that, under settled principles, "a successor employer is bound by a presumption of continued majority support 'unless it demonstrates that the [incumbent] union no longer represents a majority of employees on the date of the refusal to bargain, or that the refusal to bargain was grounded on a good faith doubt of the union's majority status' " (Pet. App. 5a). The Board further noted that the evidence proffered in the Company's motion did not relate to any "doubt" of the Union's majority status at the time of the refusals to bargain in November 1973. Rather, it was a "doubt" assertedly based upon a lack of majority support revealed in a poll of employees conducted almost a year after the earlier unlawful refusals to bargain. The Board concluded (Pet. App. 6a-7a):

> Under these circumstances, to allow an employer to rely on a union's subsequent failure to retain majority status would result in permitting the employer "to profit from [its] own wrongful refusal to bargain." Similarly, were we to accede to Respondent's alternative request and order an election when it is claimed that a union has lost its majority support subsequent to or
>
> > during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to

> union membership indefinitely to postpone performance of their statutory obligation. * * *[2]

The court of appeals summarily enforced the Board's supplemental order (Pet. App. 2a).

5. Petitioner does not here question the Board's finding that it is a successor to Leatherwood, that it had no good faith doubt of the Union's majority at the time it assumed Leatherwood's operation, and that therefore it violated Section 8(a)(5) and (1) of the Act by then refusing to recognize and bargain with the Union. Petitioner's sole contention is that the Board was required to suspend or vacate its bargaining order because of the Union's alleged subsequent loss of majority status.

In *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702, this Court recognized that an unlawful refusal to bargain contributes to an erosion of union support and that allowing an employer to rely upon a subsequent loss of majority would permit him to profit from his own wrong. Thus, a bargaining relationship rightfully established is entitled to a "fair chance to succeed" before employer challenges to the union's majority status will be entertained. 321 U.S. at 705; and see *National Labor Relations Board* v. *Mexia Texile Mills, Inc.*, 339 U.S. 563, 568. Here, the Company, since taking over operations in November 1973, has steadfastly refused to recognize and bargain with the Union and has therefore deprived the bargaining relationship of any chance to succeed. In these circumstances, the Company cannot rely on the loss of majority purportedly revealed in its September 1974 poll

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[2]Quoting from *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702, 705.

of employees to relieve the Company of its statutory obligation.[3]

Contrary to petitioner's contention (Pet. 10), *Franks Bros.* is not limited to instances where "outrageous" or "pervasive" unfair labor practices have occurred.[4] And *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, relied on by petitioner (Pet. 13-14), is wholly inapplicable. That case involves the propriety of the issuance of a bargaining order in an initial recognition situation. It has no bearing on whether an existing obligation to recognize an incumbent union should be terminated because of the union's alleged loss of majority support.

In sum, as in *National Labor Relations Board* v. *National Plastic Products Co.*, 175 F. 2d 755, 759-760 (C.A. 4), "[t]he case here is not one where the employer has complied with the order of the Board to bargain and later desisted because of belief that the majority status of the union no longer existed * * * [but rather] is one where the employer has adopted an intransigent attitude and has refused to obey the order of the Board from the beginning * * *."

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[3]Petitioner's assertion (Pet. 4, n. 2) that it was unable to challenge the Union's majority at the time it assumed the operation is in error. Petitioner could have obtained a Board election had it been able to show, at that time, a reasonable objective basis for believing that the Union had lost its majority status. See *United States Gypsum Co.*, 161 NLRB 601; *Zim's Foodliner, Inc.* v. *National Labor Relations Board*, 495 F. 2d 1131, 1139 (C.A. 7), certiorari denied, 419 U.S. 838.

[4]Petitioner's description of the facts of *Franks Bros.* (Pet. 10) is not drawn from this Court's opinion in that case. In particular, the Court did not describe the unfair labor practices there as "outrageous" or "pervasive." In fact, it found them "unnecessary to be detailed" in the opinion. 321 U.S. at 703.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

APRIL 1977.

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*The Solicitor General is disqualified in this case.